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***Attorneys for Petitioner.***

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1933

**No. 578**

ALICE ASCHENBRENNER,
*Petitioner,*
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY,
*Respondent.*

## RESPONDENT'S PETITION FOR A REHEARING.

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# In the Supreme Court
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No. 578

Alice Aschenbrenner,
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vs.

United States Fidelity & Guaranty Company,
*Respondent.*

## RESPONDENT'S PETITION FOR A REHEARING.

*To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:*

The respondent respectfully asks the court for a rehearing for the following reasons:

The material provision of the policy involved here, providing for payment of the double indemnity, is as follows:

"If such injury is sustained by the insured (1) While a passenger in or on a public conveyance

(including the platform, steps, or running board thereof) provided by a common carrier for passenger service."

It is difficult to conceive how the company could have said more definitely, unambiguously, and explicitly, that the assured must be a passenger upon a public conveyance operated by a common carrier, than has the company said it in the quoted language, and to put it more concretely, how the assured could have been required in plainer language to have become a passenger on the train here, regardless of what position he occupied upon it. If the wording had been only "while a passenger", without further qualification, there might have been room for misconstruction. However, the qualification is definite and fixed that the assured must be a passenger upon a public conveyance provided by a common carrier for passenger service. It does extend, to be sure, the coverage to the assured while upon the platform, steps, or running board of the conveyance while a passenger, but to compel the payment of the double indemnity when the assured has not become a passenger, is to ignore a plain phrase in the condition, namely, "While a passenger". This phase of the controversy is aptly summed up in the language of the opinion of the Circuit Court of Appeals following:

> "The appellee insists that full force should be given to the words 'platform, steps, or running board.' In this contention, the appellee is quite correct. But equal force should be given to the words 'while a passenger.' If the appellee has not brought herself within *all* the conditions



> precedent to recovery under the policy, she cannot be awarded double indemnity."

This brings us, then, to the crucial point in the case, namely, what is the meaning of the word "passenger" as used in the policy, and to what rules shall recourse be had in order to determine the meaning? The Circuit Court of Appeals, by reason of the fact that the provision required the assured to be a passenger upon a passenger conveyance operated by a common carrier, had recourse to the law of carriers to determine the meaning. In doing this it followed what was practically the universal rule in this connection prior to the decision of the case at bar by this court. The cases cited by both the petitioner Aschenbrenner and the respondent supported this rule.

*Cooley's Briefs on Insurance*, 2nd Ed., Vol. 6, p. 5590;

*Travelers Insurance Co. v. Austin*, 42 S. E. 522;

*Berliner v. Travelers Insurance Co.*, 121 Cal. 451;

*Quinn v. National Life Insurance Co.*, 195 N. W. 427.

The test, as provided by the law applicable to carriers, is fixed and certain. It is a universal rule under that law that one who attempts to board a moving train, if otherwise qualified to become such, does not become a passenger until he reaches a place of safety upon it. The authorities are legion and the rule is practically without question.

*Tompkins v. Portland R. R. Co.*, 77 Ore. 174; 150 Pac. 758;

*Palmer v. Willamette Valley R. R. Co.* (Ore.), 171 Pac. 1169;

*White's Personal Injuries on Railroads*, Vol. 2, Sections 556 and 783;
*Trapnell v. Hines*, 268 Fed. 504;
*Illinois Central R. R. Co. v. Cotter* (Ky. App.), 103 S. W. 279;
*Kentucky Highlands R. C. Co. v. Creal* (Ky. Sup.), 179 S. W. 417; L. R. A. 1916B 830;
*Matthews v. Metropolitan Street R. R. Co.*, 137 S. W. 1003;
*Schepers v. Union Depot R. R. Co.* (Mo. Sup.), 29 S. W. 712;
*Lee v. Baker* (Tex. Civ. App.), 251 S. W. 580;
*Schafer v. St. Louis and S. R. R. Co.* (Mo. Sup.), 30 S. W. 331; 4 R. C. L. Sections 489, 490, 493;
*Boyd v. Royal Indemnity Co.*, 166 N. E. 580;
*Fay v. Etna Life Ins. Co.*, 187 S. W. 861;
*Speaks v. Metropolitan R. R. Co.*, 166 S. W. 864.

To be sure, where the carrier is sued, there is the additional question of contributory negligence, between the parties, which is not involved here. But in those cases, the first question to answer before that of contributory negligence is reached is to determine the status of the plaintiff, namely, whether he is passenger, trespasser, licensee, etc. Those cases in which the decision was in favor of the carrier because of the contributory negligence of the plaintiff were not cited, because they had no bearing here, but those cases in which the decision was in favor of the carrier because the plaintiff had not become a passenger, are cited above. The court, in the case at bar, has cast this rule

in question, even where a carrier defendant is involved, by the following language:

> "but it is not clear that such cases turn on the existence or non-existence of the carrier passenger relationship" (citing *Atchison, Topeka, etc. v. Holloway*, 71 Kan. 1; 80 Pac. 31),

thus lending the great weight of its voice to sound a doubt upon the rule which heretofore has been deemed to be so well established as to be not open to question.

In the case at bar the court has declined to follow the rule laid down in the law of carriers, and has substituted no rule whatever in its stead. The crux of this matter appears in this language of the opinion:

> "We think the word 'passenger' cannot be restricted to the technical meaning assigned to it by the law of common carriers, for it also has a common or a popular meaning which would at least include the insured, who, with a ticket in his possession, was riding on the steps of the train."

The court nowhere states what the limitations are upon this popular conception, or what the popular definition is, except in so far as the latter language of the paragraph, shortly to be discussed, does this, and by this language a word which appears probably in tens of thousands of policies outstanding in this country has been accorded such an uncertain and nebulous significance as to require in each instance the decision of a court upon the facts presented before it can be said whether one is or is not a passenger within the meaning of the term. There is absolutely no way within the four corners of the opinion in this case to determine what the word passenger does mean.

There is no criterion furnished, nor in effect any rule stated which can be used as a measure of the meaning of this term, except the pleasure of the court which may be called upon to decide the case.

Following the language just quoted, the court says:

> "In its usual popular significance the term when applied to one riding a train indicates a traveler intending to be transported for hire or upon contract with the carrier, and distinguishes him from those employed to render service in connection with the journey." (Citing authorities.)

We have examined each of the cases cited, and none of them casts light upon the limitation to be placed upon this popular conception of which the court speaks.

The inference which the court indicates in the use of this language is that because the persons mentioned in the authorities cited in this connection were not passengers, that the assured was a passenger. How this conclusion is reached is not entirely clear. The court says that the popular significance of the term of one riding a train indicates a traveler intending to be transported for hire or upon contract with the carrier. That is an entirely new conception of the word "passenger". At what point does the relationship actually attach under such circumstances, and when one intends to be transported for hire, at what point must the intention ripen into reality? Suppose he intends to pay his fare but never does pay it. Suppose he intends to pay it but has not the means. He would be a passenger within the meaning of the definition adopted by the court. Suppose one should

jump on to the top of a train, and intend if he should be successful in getting from the top of the train to the inside of it to pay his fare. Would he be a passenger while riding on the top of the train? Suppose he should jump upon the blind baggage door and should ride there, intending at some future time, if possible, to go inside the train and pay his fare. Would he be a passenger while riding there? Suppose he were riding the brake beams, intending at some future time and place to leave the brake beams and go inside the car and pay his fare. Would he be a passenger while riding on the brake beams? The language which the court uses is clearly broad enough to include such persons within its scope, for the court says: "a traveler intending to be transported", and does not restrict the meaning to one who has actually entered into a contract, express or implied, to be transported. When the assured left his home on the morning that he was killed, he intended to become a passenger upon the train. Yet during the journey to the station in the taxicab, he cannot under any conception of the word be deemed to have been a passenger. It is obvious that under any view the person intending to become a passenger must have reached the point where he can and does avail himself of the facilities of the carrier for carrying passengers. In the law of carriers he must also conform to the conditions, express or implied, fixed by the carrier in addition to reaching the place. In the case at bar the court has held that he need not conform to those conditions. The question then arises, to what conditions must he conform? Does

he fix his own conditions? Does the law fix them? If so, what are they? At what point did the assured here attain the status of passenger? It is obvious even under a popular conception of the term, that there was a period when he was not a passenger, and at some instant of time, even under the court's view, the status attached. Was it when he commenced to run across the station platform to board a train then in motion? Was it when he got hold of the grab iron? Was it when his feet got onto the lower step? If so had he fallen instantly, he would have been under the court's view, a passenger. Did he acquire it at some point while he was traveling the twenty or thirty feet before he fell? It is clear from the authorities that he never acquired the status, from the standpoint of the law of carriers.

We mention these considerations to indicate how impossible it is to apply the ruling in this case as a guide for other cases. The elasticity of this definition is sufficient to include every person traveling upon a train in any capacity whatsoever, if he intends later to pay his fare, except those employed to render service in connection with the journey. It converts persons who have always been deemed to be trespassers into passengers, and, we respectfully submit, casts into the sea of uncertainty tens of thousands of policies of accident insurance now outstanding.

To be sure, if the word passenger is ambiguous and susceptible of different interpretations, the term must be considered most strongly against the insurer. But that presupposes an ambiguity. It presupposes that

the different interpretations of which the term is susceptible to be reasonable, and not so strained as to do violence to the meaning of the term. The interpretation placed upon the term by the court here is wholly unreasonable in that it extends the meaning to include persons who under any fair conception of the word are not passengers.

This court further states in this important paragraph in his opinion that "none of the standard dictionaries defines the term in a fashion suggesting that its meaning is to be limited in terms of the legal liability of the carrier". What these definitions are is not set forth. Funk & Wagnall's Standard Dictionary defines the word "passenger" as follows:

> "1. A person who travels in a public conveyance, as a railway car or steamship; one carried for fare by a common carrier."

The first part of this definition is broad enough, if carried to its logical conclusion, to include every person, including employees, licensees, trespassers, and what not, so long as they are traveling in a public conveyance. Webster's International Dictionary defines the term as follows:

> "1. A passer through or passer by wayfarer; traveler, now rare except in foot passenger.
>
> 2. A traveler by some established conveyance, as a coach, steamboat, railroad train, etc."

Other definitions follow in Webster's which have no bearing upon the question here. Of this definition the same can be said that has been said of the standard

dictionary definition. A trespasser, a bare licensee, an employee, in fact anyone traveling by some "established conveyance", regardless of his relation to the operation of the conveyance, all are included within it.

If it is the purpose of the court in the present case to adopt the dictionary definition of the word "passenger" as used in this policy, then we believe that the opinion should be modified so as to relieve this question of all uncertainty. The decision then would stand as clear authority for the proposition that the dictionary definition in construing this term is the one endorsed by the court. As the opinion now stands the term "passenger" is somewhere in the uncertain zone between the definition accorded the word "passenger" in the law of carriers, and the broad dictionary definition alluded to by the court, because the court, in the earlier part of the paragraph discussed carves out of the broad dictionary definition persons otherwise within this definition, namely those employed to render service in connection with the journey, but otherwise does not narrow the scope of the definition. In other words, the court has apparently adopted a new definition of the term "passenger", broader than that given to it in the law of carriers, narrower than that given to it in the dictionaries, and yet has itself not defined the term save to say that it is neither the one nor the other. We respectfully submit that this in effect leaves the term without meaning, and with the criterion repudiated by the court by which the meaning has heretofore been determined, leaves no way for its meaning to be determined.

We respectfully ask, therefore, that this court grant a rehearing in the court, to reconsider the effect of its ruling.

Dated, San Francisco, California,
May 7, 1934.

BRANDENBURG & BRANDENBURG,
EDWIN C. BRANDENBURG,
HORACE W. B. SMITH,
GEORGE A. WORK,
*Attorneys for Respondent and Petitioner.*

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for respondent and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
May 7, 1934.

GEORGE A. WORK,
*Of Counsel for Respondent and Petitioner.*

*Due service and receipt of a copy of the within is hereby admitted*

*this* ..... *day of May, 1934.*

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*Attorneys for Petitioner.*

# SUPREME COURT OF THE UNITED STATES.

No. 578.—October Term, 1933.

| | |
|---|---|
| Alice Aschenbrenner, Petitioner, *vs.* United States Fidelity & Guaranty Company. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit. |

[April 2, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioner, a beneficiary of a policy of accident insurance issued to her husband by respondent, brought this suit in the District Court for Northern California to recover under the double indemnity provisions of the policy. At the trial liability was conceded for the single amount stipulated to be paid in the event of the insured's death by accident, but double liability was contested on the ground that the insured, at the time of the accident, was not a passenger on a common carrier within the meaning of the double indemnity provisions of the policy. A judgment entered upon a verdict for the petitioner for the double liability was reversed by the Court of Appeals for the Ninth Circuit, which directed that judgment be reduced by one-half. 65 F. (2d) 976. Certiorari was granted, — U. S. —, to resolve an alleged conflict of the decision below with those in other circuits. See *London Guarantee & Accident Company* v. *Ladd*; *Preferred Accident Insurance Co. of New York* v. *Ladd*, 299 Fed. 562, 565 (C. C. A. 6th); *Aetna Life Insurance Co.* v. *Davis*, 191 Fed. 343 (C. C. A. 8th); *Preferred Accident Insurance Co. of New York* v. *Muir*, 426 Fed. 926 (C. C. A. 3d); compare *Fidelity & Casualty Co. of New York* v. *Morrison*, 129 Ill. App. 360.

The policy provided for payment of a specified amount in case of loss of life of the insured resulting from accidental bodily injury and for payment of double that amount "if such injury is sustained by the insured (1) while a passenger in or on a public conveyance (including the platform, steps or running board thereof) provided by a common carrier for passenger service". The insured, who had

in his possession a ticket entitling him to transportation, arrived at the railroad station platform just as the train started to move out of the station. There was testimony from which the jury might have found that, while the train was moving at a speed of seven to ten miles an hour but was still within the station and opposite the platform, with vestibule doors open, the insured jumped onto the lower step of a car, his hand grasping the handrail, and that he continued for a brief time, while the train moved about twenty feet, to stand with both feet upon the step but with a small part of his body or clothing projecting beyond or outside the vestibule until it brushed against a bystander on the platform in a manner causing the insured to lose his hold and fall to his death.

The trial judge instructed the jury that if the insured held a ticket entitling him to ride as a passenger, and in attempting to board the train while in motion he stood with both feet upon the step, he was a passenger and entitled to recover under the double indemnity clause. The only question which it is necessary to decide here is whether the insured was a "passenger" at the time of the accident within the meaning of the policy. The Court of Appeals ruled that he was not; it reached this conclusion by applying the term as it was said to be defined in the law of common carriers.

In personal injury suits against common carriers, brought by persons who, intending to be passengers, were injured while endeavoring to mount the steps of a moving train, courts have sometimes said that the implied invitation to board the train is withdrawn when it begins to move and that the duty of the carrier to exercise a high degree of care toward its passengers does not attach in such circumstances because one seeking to board a moving train does not become a passenger until he reaches a place of safety. *Trapnell* v. *Hines*, 268 Fed. 504, 506; *Illinois Central R. R.* v. *Cotter*, 31 Ky. Law Rep. 679; *Kentucky Highlands R. Co.* v. *Creal*, 166 Ky. 469; *Mathews* v. *Metropolitan Street Ry. Co.*, 156 Mo. App. 715; *Schepers* v. *Union Depot R. Co.*, 126 Mo. 665, 675; *Tompkins* v. *Portland Ry. Co.*, 77 Ore. 174, 179; *Palmer* v. *Willamette Valley Southern Ry. Co.*, 88 Ore. 322, 330. The Court of Appeals thought that the evidence here would have made no case for the jury in a suit against the carrier, and therefore concluded that the trial judge should have directed a verdict for the insurer on the issue of double indemnity.

No doubt intending passengers who are injured in attempting to board a moving train, unless they were invited to do so, are not usually entitled to recover from the carrier. But it is not clear that such cases turn on the existence or non-existence of the passenger-carrier relationship. See *Atchison, Topeka & Santa Fe Ry. Co.* v. *Holloway*, 7d Kan. 1. It has often been recognized that the relationship of carrier and passenger may arise and the duty of the carrier to the passenger attach when the latter comes upon the station platform and before boarding the train. See *Warner* v. *Baltimore & Ohio R. R. Co.*, 168 U. S. 339; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Holloway*, *supra*; *Wabash, St. Louis & P. R. Co.* v. *Rector*, 104 Ill. 296; *Chicago & E. I. R. Co.* v. *Jennings*, 190 Ill. 478, 483; Michie, Carriers (1915), §§ 2126, *et seq.* Yet the negligence of a passenger in going into a known place of danger without the inducement or invitation of the carrier may bar his recovery for the resulting injury, even though the passenger-carrier relationship has begun and continues. See *Warner* v. *Baltimore & Ohio R. R. Co.*, *supra*; *Daley* v. *Boston, Revere Beach & L. R. Co.*, 241 Mass. 78. And in the case of the insured, who had come upon the station platform intending to be a passenger, it may be that negligence in jumping uninvited onto the moving train would bar his recovery from the carrier without resort to the artificial assumption of a hiatus in that relationship during the brief interval required for boarding the train. The notion of such a suspension of the passenger-carrier relationship has been rejected in allowing recovery upon policies insuring against injury while travelling as a "passenger" on a railway train, both where the passenger alighted from the train at an intermediate stop and was injured in attempting to return to the train after it started to move again, *Wharton* v. *New York Life Insurance Co.*, 178 N. C. 135, 138, and where the insured, in beginning his journey, was injured in attempting to board a moving train. *Fidelity & Casualty Co. of New York* v. *Morrison*, 129 Ill. App. 360.

But it is unnecessary here to follow the niceties of legal reasoning and terminology applied in negligence suits against common carriers, for we are interpreting a contract and are concerned only with the sense in which its words were used. *Farber* v. *Mutual Life Ins. Co. of New York*, 250 Mass. 250, 254; *Boyd* v. *The Royal Indemnity Co.*, 120 Oh. St. 515, 517. The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed